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The Untouchable Executive Authority: Trump and The Section 232 Tariffs on Steel and Aluminum

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The Untouchable Executive Authority: Trump and The Section 232 Tariffs on Steel and Aluminum

Arim Jenny Kim *

In 2018, President Trump championed his way through the imposition of the Section 232 Tariffs—a heavy tax on various imports, including steel and aluminum—by broadcasting a supposedly-imminent threat to the U.S. national security. This plea, however, has been criticized as a veil for President Trump’s economic protectionism policy. Meanwhile, others have questioned the constitutionality of the statute creating the President’s authority to impose these tariffs in the first place. This Comment explores the issues arising from President Trump’s Section 232 Tariffs on steel and aluminum: (1) the validity and justiciability of President Trump’s actions under Section 232 of the Trade Expansion Act of 1962, and (2) the constitutionality of Section 232.

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INTRODUCTION

President Donald J. Trump, an advocate of tariffs, has upended the traditional U.S. trade policy as evidenced by his recent actions.¹ Tariffs—taxes on imports—are a method of safeguarding a country’s domestic industries as a form of economic and trade protectionism.² By taxing imported foreign goods, tariffs raise the price of imports for domestic consumers and limit domestic manufacturers’ competition with foreign products.³

The United States once revered a policy of economic protectionism, which supported the growth of American businesses, and successfully enacted tariffs to strengthen its economy during the Great Depression.⁴ Nevertheless, this policy was short-lived in the United States due to the diplomatic frictions that resulted from tariffs.⁵

After World War II, the United States changed its course of trade and adopted a primarily neoliberal trade policy, which promotes open markets and free trade, that resulted in the international growth of American businesses.⁶ Since the adoption of neoliberalism, tariffs have been imposed conservatively around the world due to what has become generally accepted as their irreparable economic, diplomatic, and legal

¹ See Chad P. Brown & Melina Kolb, *Trump’s Trade War Timeline: An Up-to-Date Guide*, PETERSON INST. FOR INT’L ECON. (Aug. 23, 2019), <https://piie.com/blogs/trade-investment-policy-watch/trump-trade-war-china-date-guide>.

² See Kimberly Amadeo, *Trade Protectionism Methods With Examples, Pros, and Cons: Why Protectionism Feels So Good But Is So Wrong*, THE BALANCE (Jul. 10, 2019), <https://www.thebalance.com/what-is-trade-protectionism-3305896>.

³ See *id.*

⁴ See *id.*; see e.g., Smoot-Hawley Tariff Act of 1930, Pub. L. 71–361, ch. 497, 46 Stat. 590 (1930) (codified as amended 19 U.S.C. ch. 4).

⁵ See Arthur MacEwan, *The Neoliberal Disorder: The Inconsistencies of Trade Policy*, THE NORTH AMERICAN CONGRESS ON LATIN AMERICA (Sept. 25, 2007), <https://nacla.org/article/neoliberal-disorder-inconsistencies-trade-policy>; Amadeo, *supra* note 1.

⁶ See MacEwan, *supra* note 4.

harms.⁷ Under the Trump Administration, however, the fate of American neoliberalism is uncertain as the White House retrogrades through the history of trade policies by embracing tariffs once again.⁸

Since 2018, President Trump has applied various tariffs by proclaiming foreign imports as national security threats.⁹ For example, pursuant to Section 232 of the Trade Expansion Act of 1962 (“Section 232”),¹⁰ the Department of Commerce (the “DoC”) conducted investigations on the steel and aluminum industry and concluded that imported steel and aluminum “threaten to impair national security.”¹¹ Thereafter, President Trump took action “to protect America”¹² by imposing the Section 232 Tariffs: a 25 percent tariff on imported steels on March 8, 2018,¹³ and a 10 percent tariff on imported aluminums on March 15, 2018.¹⁴ The President portrayed these tariffs as an American victory against countries attempting to export into the United States by characterizing tariffs as “a lot of money coming into the coffers of the United States of America.”¹⁵

⁷ See S.K., *Why Tariffs Are Bad Taxes*, THE ECONOMIST (July 31, 2018), <https://www.economist.com/the-economist-explains/2018/07/31/why-tariffs-are-bad-taxes>.

⁸ See Mehdi Noorbaksh, *The Fate of Neoliberalism Under Trump*, FAIR OBSERVER (Jan. 17, 2017), https://www.fairobserver.com/region/north_america/neoliberalism-donald-trump-united-states-america-news-43540/.

⁹ See Brown & Kolb, *supra* note 1.

¹⁰ 19 U.S.C. § 1862(b)(1)(A) (1962).

¹¹ Shannon Togawa Mercer & Matthew Kahn, *America Trades Down: The Legal Consequences of President Trump's Tariffs*, LAWFARE (Mar. 13, 2018), <https://www.lawfareblog.com/america-trades-down-legal-consequences-president-trumps-tariffs>.

¹² PRESS RELEASE, THE WHITE HOUSE, WHAT YOU NEED TO KNOW: SECTION 232 INVESTIGATIONS AND TARIFFS (Mar. 8, 2018), <https://www.whitehouse.gov/briefings-statements/need-know-section-232-investigations-tariffs/>.

¹³ Although the DoC recommended a 24 percent tariff on steel, President Trump increased the number to 25 percent because a round number “sounded better” to him. Jonathan Swan, *Inside the White House Trade Fights*, AXIOS (Feb. 25, 2018), <https://www.axios.com/inside-the-white-house-trade-fights-1519601322-5de818bf-4787-42a5-9e7e-f780f4e2ebef.html>.

¹⁴ See Scott Horsley, *Trump Formally Orders Tariffs on Steel and Aluminum Imports*, NPR (Mar. 8, 2018), <https://www.npr.org/2018/03/08/591744195/trump-expected-to-formally-order-tariffs-on-steel-aluminum-imports>; see also Adjusting Imports of Aluminum Into the United States, 83 Fed. Reg. 11619 (Mar. 15, 2018); Adjusting Imports of Steel Into the United States, 83 Fed. Reg. 11625 (Mar. 8, 2018).

¹⁵ Peter Coy, *The Real Pain From Trump's Tariffs Trickles Down to Consumers*, BLOOMBERG (Sept. 28, 2018), <https://www.bloomberg.com/news/articles/2018-09-28/who-pays-for-trump-s-tariffs>.

Similarly, in January 2018, President Trump levied safeguard tariffs on imported residential washing machines and solar panels.¹⁶ This action was premised on Section 201 of the Trade Act of 1974 examination by the United States International Trade Commission, which concluded that “increased foreign imports of washers and solar panels and modules are a substantial cause of serious injury to domestic manufacturers.”¹⁷ Moreover, on March 22, 2018, the Office of the United States Trade Representative (the “USTR”) released a report from its investigation under Section 301 of the Trade Act of 1974, which found that China’s trade practices related to technology transfer, intellectual property, and innovation were unreasonable and discriminatory.¹⁸ As a result of the Section 301 examination, a tariff-tug-of-war between the United States and China has ensued, as both countries have taken turns increasing their respective rates on tariffs and quotas on a wide range of consumer goods.¹⁹

Although President Trump has justified the tariffs by characterizing them as necessities in response to national security threats, some constituencies have criticized the President’s actions.²⁰ Many scholars fear that the retaliation by trading partners, which may issue reciprocal tariffs and quotas on American goods, could result in a full-blown trade war that destroys the global economy.²¹ In response to critics’ fear and public

¹⁶ See David J. Lynch, *Trump Imposes Tariffs on Solar Panels and Washing Machines in First Major Trade Action of 2018*, WASHINGTON POST (Jan. 22, 2018), https://www.washingtonpost.com/news/wonk/wp/2018/01/22/trump-imposes-tariffs-on-solar-panels-and-washing-machines-in-first-major-trade-action/?utm_term=.b496b394abdf.

¹⁷ See Press Release, Office of the U.S. Trade Representative, President Trump Approves Relief for U.S. Washing Machine and Solar Panel Cell Manufacturers (Jan. 22, 2018), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/january/president-trump-approves-relief-us>; see also U.S. Int’l Trade Comm’n, Large Residential Washers – Investigation No. TA-201-076, Publication 4745 (2017); U.S. Int’l Trade Comm’n, Crystalline Silicon Photovoltaic Cells (Whether or not Partially or Fully Assembled into Other Products) – Investigation No. TA-201-75, Publication 4739 (2017).

¹⁸ See OFFICE OF THE U.S. TRADE REPRESENTATIVE, FINDINGS OF THE INVESTIGATION INTO CHINA’S ACTS, POLICIES, AND PRACTICES RELATED TO TECHNOLOGY TRANSFER, INTELLECTUAL PROPERTY, AND INNOVATION UNDER SECTION 301 OF THE TRADE ACT OF 1974 (2018); see also Brown & Kolb, *supra* note 1.

¹⁹ See Brown & Kolb, *supra* note 1.

²⁰ See Shrutee Sarkar, *Economists united: Trump Tariffs Won’t Help the Economy*, REUTERS (Mar. 13, 2018, 8:32 PM), <https://www.reuters.com/article/us-usa-economy-poll/economists-united-trump-tariffs-wont-help-the-economy-idUSKCN1GQ02G>.

²¹ See *id.* (Economists have expressed their concern that “tariffs on steel and aluminum imports would lead to a wider trade war.” One economist expressed that “[i]t will be very surprising if there isn’t some measured retaliation overtime from major trading partners.”).

outcry against the Trump Administration's use of tariffs,²² there have been judicial and congressional attempts to halt these tariffs and prohibit President Trump from imposing more.²³ These efforts have not yet been unsuccessful, however, due to statutory provisions that provide the president with nearly exclusive power to control American trade policy.²⁴ This Comment questions and analyzes how the vital power to govern the American economy and its trade has been delegated to the Executive.

Although the Trump Administration has begun to apply numerous special tariffs since 2018,²⁵ this Comment solely focuses on the Section 232 Tariffs on the steel and aluminum industry (the "Section 232 Tariffs"). Part I presents the legal background of Section 232 and the enactment of the Section 232 Tariffs. Part II investigates and analyzes the issues surrounding the justiciability of the Section 232 Tariffs, and the constitutionality of the statute. Part III introduces pending legislative bills relating to Section 232 (as of August 2019). Lastly, Part IV concludes with an outlook to the future of Section 232 and the inevitable consequences of the Section 232 Tariffs.

I. THE SECTION 232 TARIFFS ON STEEL AND ALUMINUM

A. *Section 232 of the Trade Expansion Act of 1962*

Pursuant to Section 232, the Secretary of Commerce (the "Secretary") may conduct a Section 232 investigation to "determine the effects on the national security of imports" upon a request for investigation from an interested party or a self-initiation by the Secretary.²⁶ Within 270 days of the investigation, the Secretary is then required to provide the president with a report on the findings of the investigation—specifically, whether an item "is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security."²⁷ Thereafter, the president must conclude whether he or she concurs with the Secretary's findings within 90 days of receiving the report.²⁸

If the president agrees with the findings, he or she has the power to "determine the nature and duration of the action that, in the judgment of

²² E.g., Clark Packard & Megan Reiss, *Steel Protectionism Won't Protect National Security*, LAWFARE (Jan. 12, 2018, 7:29 PM), <https://www.lawfareblog.com/steel-protectionism-wont-protect-national-security>; Sarkar, *supra* note 20.

²³ See *infra* Part IV; see also Mercer & Kahn, *supra* note 11.

²⁴ See *infra* Part III.

²⁵ Brown & Kolb, *supra* note 1.

²⁶ 19 U.S.C. § 1862(b)(1)(A).

²⁷ *Id.* § 1862(b)(3)(A).

²⁸ *Id.* § 1862(c)(1).

the [p]resident, must be taken to adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security.”²⁹ In essence, the statute grants the president sole discretion to adjust imports in any way he or she dictates due to the lack of guidance and limitations on the methods of adjustment. In determining whether an import impairs the national security, however, Section 232(d) outlines the following factors to consider:

domestic production needed for projected national defense requirements, the capacity of domestic industries to meet such requirements, existing and anticipated availabilities of the human resources, products, raw materials, and other supplies and services essential to the national defense, the requirements of growth of such industries and such supplies and services including the investment, exploration, and development necessary to assure such growth, and the importation of goods in terms of their quantities, availabilities, character, and use as those affect such industries and the capacity of the United States to meet national security requirements . . . [,] the close relation of the economic welfare of the Nation to our national security, . . . the impact of foreign competition on the economic welfare of individual domestic industries; and any substantial unemployment, decrease in revenues of government, loss of skills or investment, or other serious effects resulting from the displacement of any domestic products by excessive imports³⁰

Although Section 232(d) includes a suggestive list of elements that could potentially affect national security, the statute does not provide legislative or judicial remedy for the president’s actions taken against imports.³¹ However, the statute does provide a special exception to petroleum products: any action “to adjust imports of petroleum or petroleum products shall cease to have force and effect upon the enactment of [Congress’s] disapproval resolution.”³²

Between Congress’s enactment of Section 232 in 1962 and President Trump’s inauguration in 2017, there were 26 Section 232 investigations.³³

²⁹ *Id.* § 1862(c)(1)(A).

³⁰ *Id.* § 1862(d).

³¹ *See id.*; *see infra* Part II.B.2.

³² *Id.* § 1862(f)(1).

³³ *See* RACHEL F. FEFER & VIVIAN C. JONES, CONG. RESEARCH SERV., IF10667, SECTION 232 OF THE TRADE EXPANSION ACT OF 1962 (2018).

Of the 26 investigations, the DoC found that 62% of the time the subject of the investigations did not threaten national security.³⁴ In fact, only *five* of those investigations resulted in presidential action, only two of which constituted legitimate executive action: an embargo on crude oil from Iran in 1979, and an embargo on crude oil from Libya in 1982.³⁵ Of the other three instances, two actions were based on a pre-existing initiative that predated Section 232 and thus, did not raise executive power issues.³⁶ The remaining action—President Carter’s action to impose a gasoline conservation fee on petroleum products—was held illegal in 1980 because the Trade Expansion Act “does not authorize the President to impose general controls on domestically produced goods.”³⁷ Although “a regulation on imports may incidentally regulate domestic goods,” the District Court for the District Court of Columbia found that President Carter’s conservation fee had a greater impact on domestically produced oil than imported oil as it affected all gasoline sales, including domestic products.³⁸ Furthermore, none of the five presidential actions constituted an increase of existing tariffs and quotas.

B. *The Enactment of the Section 232 Tariffs*

In April 2017, Secretary of Commerce Wilbur Ross initiated Section 232 investigations to determine the effects of imported steel and aluminum on national security.³⁹ Thereafter, in January 2018, the DoC submitted two reports (collectively, the “Section 232 Reports”) that outlined the Secretary’s findings and recommendations: *The Effects of Imports of Steel on the National Security*,⁴⁰ and *The Effects of Imports of Aluminum on the National Security*.⁴¹

³⁴ These embargoes were later superseded by economic sanctions. RACHEL F. FEFER ET AL., CONG. RESEARCH SERV., R45249, SECTION 232 INVESTIGATIONS: OVERVIEW AND ISSUES FOR CONGRESS 3 (2019).

³⁵ See *id.* at 3–4.

³⁶ See FEFER & JONES, *supra* note 33.

³⁷ *Indep. Gasoline Marketers Council, Inc. v. Duncan*, 492 F. Supp. 614, 618 (D.D.C. 1980); see also *id.* at 620 (“It is clear that Congress, not the President, must decide whether the imposition of a gasoline conservation fee is good policy.”).

³⁸ *Id.* at 618.

³⁹ See FEFER ET AL., *supra* note 34, at 5–6; David Lawder, *U.S. Launches National Security Probe into Aluminum Imports*, REUTERS (April 27, 2017, 10:06 AM), <https://www.reuters.com/article/us-usa-trade-aluminum/u-s-launches-national-security-probe-into-aluminum-imports-idUSKBN17T044>.

⁴⁰ U.S. DEP’T OF COMMERCE, THE EFFECT OF IMPORTS OF STEEL ON THE NATIONAL SECURITY (2018) [hereinafter *Steel Report*].

⁴¹ U.S. DEP’T OF COMMERCE, THE EFFECT OF IMPORTS OF ALUMINUM ON THE NATIONAL SECURITY (2018) [hereinafter *Aluminum Report*].

The Section 232 Reports found that the importing rates and global overproduction of steel and aluminum threaten to impair national security and thus, recommended the strengthening of tariffs on these imports.⁴² The Secretary urged President Trump to limit these imports to promote American utilization of the domestic steel and aluminum industries, increase the availability of domestic production for national defense requirements, protect American economic welfare, and increase the employment rate.⁴³ The Section 232 Reports also claimed that international suppliers may pose as threats by cutting supply off when the United States urgently requires those supplies, such as in wartime.⁴⁴ By emphasizing the significance of these imports in protecting the nation's economy and security, the Secretary "conclude[d] that the present quantities and circumstances of steel imports are 'weakening our internal economy' and threaten to impair the national security as defined in Section 232."⁴⁵

Upon receipt of the Section 232 Reports, President Trump subsequently imposed a 25 percent tariff on imported steel on March 8, 2018,⁴⁶ and a 10 percent tariff on imported aluminum on March 15, 2018.⁴⁷ The Section 232 Tariffs covered an estimated value of \$48 billion in steel and aluminum imports, mostly from foreign exporters that are American allies.⁴⁸ Initially, President Trump excluded only Canada and Mexico, which amounted to one-third of the covered imports valued at \$15.3 billion.⁴⁹ However, President Trump established an exclusion process for trading partners to negotiate with the USTR and request for exemptions while permitting corporations to file separate petitions with the DoC to exclude specific products from the tariffs.⁵⁰ Thus, more nations are now exempted by way of the exclusion process.⁵¹

Since the levy of the Section 232 Tariffs, President Trump revised his proclamations multiple times to extend exemptions to certain countries while removing exemptions that were previously granted to others.⁵² Despite the additional exemptions and amendments to the Section 232 Tariffs, numerous trading partners have retaliated or threatened the United

⁴² See Steel Report, *supra* note 40, at 2–5; Aluminum Report, *supra* note 41, at 23–62.

⁴³ See Steel Report, *supra* note 40, at 2–5; Aluminum Report, *supra* note 41, at 23–62.

⁴⁴ See Steel Report, *supra* note 40, at 2–5.

⁴⁵ *Id.* at 5.

⁴⁶ Proclamation No. 9705, 83 Fed. Reg. 11,625 (Mar. 8, 2018).

⁴⁷ Proclamation No. 9704, 83 Fed. Reg. 11,619 (Mar. 15, 2018).

⁴⁸ See Brown & Kolb, *supra* note 1, at 3.

⁴⁹ See *id.*; Proclamation No. 9705, 83 Fed. Reg. 11,627.

⁵⁰ See FEFER ET AL., *supra* note 34, at 7; see, e.g., 15 C.F.R. pt. 705 (2018).

⁵¹ See Brown & Kolb, *supra* note 1, at 3.

⁵² See Brown & Kolb, *supra* note 1; see, e.g., Proclamation No. 9711, 83 Fed. Reg. 13,361, 13,363 (Mar. 22, 2018).

States with reciprocal tariffs and quotas on American products.⁵³ In July 2018, President Trump filed claims against these countries at the World Trade Organization to challenge their tariffs on American products; however, these claims have only exasperated the trade frictions.⁵⁴

C. *Public Response to the Section 232 Tariffs*

Despite the DoC's rationale for its finding that steel and aluminum imports threaten national security, the Department of Defense (the "DoD") expressed its concern for "the [tariffs'] negative impact on [the American] key allies."⁵⁵ In its memorandum published in response to the Section 232 Reports, the DoD stated that the steel and aluminum imports do not "impact the ability of DoD programs to acquire the steel and aluminum necessary to meet national defense requirements."⁵⁶ Furthermore, many economists and politicians have vocalized their doubt on Secretary Ross's recommendations due to their fear for the "global trade war"⁵⁷ and its eventual impacts on consumers, including the rise in the price of consumer goods.⁵⁸ Various American companies have opined that tariffs function as a tax on American businesses and consumers, not on the exporting countries.⁵⁹ Additionally, the findings of the 232 Reports have been criticized as a means for President Trump to opportunistically use national security as a veil for his economic protectionism policies.⁶⁰

⁵³ See Brown & Kolb, *supra* note 1.

⁵⁴ See *id.*

⁵⁵ See Memorandum from the Sec'y of Defense with Response to Steel and Aluminum Policy Recommendations to the Sec'y of Commerce (2018) (on file with the U.S. Dep't of Commerce).

⁵⁶ See *id.*

⁵⁷ Tariffs have reportedly caused major trade frictions between the United States and its trading partners. See e.g., *A Quick Guide to the US-China Trade War*, BBC (Dec. 12, 2019), <https://www.bbc.com/news/business-50784554> (In 18 months, "the US has imposed tariffs on more than \$360bn . . . of Chinese goods, and China has retaliated with tariffs on more than \$110bn of US products."); Keith Johnson, *U.S.-Europe Trade War Reerupts in London*, FOREIGN POLICY (Dec. 3, 2019, 4:23 PM), <https://foreignpolicy.com/2019/12/03/nato-trump-europe-trade-war-digital-tax-google/> (In response to the U.S.'s tariff on French luxury brands, France imposes a digital services tax on U.S. tech companies.); Ana Swanson, *Trump Says U.S. Will Impose Metal Tariffs on Brazil and Argentina*, NEW YORK TIMES (Dec. 2, 2019), <https://www.nytimes.com/2019/12/02/business/economy/trump-tariffs-brazil-argentina-metal.html> (President Trump announced to impose tariffs on Brazil and Argentina after accusing them of manipulating their currencies and hurting American farmers.).

⁵⁸ See, e.g., Packard & Reiss, *supra* note 22; Sarkar, *supra* note 20 ("The median probability of a recession in the coming year was 13 percent.").

⁵⁹ Mark Niquette, *Business Groups Line Up Behind Limits to Trump's Tariff Powers*, BLOOMBERG (Feb. 4, 2019), <https://www.bloomberg.com/news/articles/2019-02-04/business-groups-line-up-behind-limits-to-trump-s-tariff-powers>.

⁶⁰ See Packard & Reiss, *supra* note 22.

II. THE UNTOUCHABLE EXECUTIVE AUTHORITY UNDER SECTION 232

A. *The Validity and Justiciability of the Section 232 Tariffs*

The Constitution enshrines the doctrine of separation of powers and the system of checks and balances into the power-structure of the federal government.⁶¹ The federal government is comprised of three branches: (i) the Legislative Branch, which is composed of the House of Representatives and the Senate;⁶² (ii) the Executive Branch, which includes the President, the Vice-President, and the Departments;⁶³ and (iii) the Judicial Branch, which is headed by the Supreme Court.⁶⁴ These branches have distinct and limited authority as enumerated in separate Articles of the Constitution,⁶⁵ which grant each branch the ability to check the actions of the others to prohibit inter-branch encroachment and abuse of power.⁶⁶

Accordingly, the Constitution provides Congress with enumerated legislative authority under Article I, including the power “to lay and collect Taxes, Duties, Imposts and Excises”⁶⁷ as well as the power “[t]o regulate Commerce with foreign Nations.”⁶⁸ The exclusivity of this authority, however, has been blurred throughout history as Congress has explicitly and implicitly relayed some of its authority to the president.⁶⁹ Although the delegations of authority may seem antithetical to the doctrine

⁶¹ See generally T.J. Halstead, Cong. Research Serv., R44334, *The Separation of Powers Doctrine: An Overview of Its Rationale and Application* 10 (1999) (“While the Constitution provides separate institutions and bases of power, the structure does not insulate the branches from each other.”).

⁶² U.S. Const. art. I.

⁶³ *Id.* art. II.

⁶⁴ *Id.* art. III.

⁶⁵ See *id.* art. I; *Id.* art. II; *Id.* art. III.

⁶⁶ See Halstead, *supra* note 61, at 10; Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 Yale L.J. 1672, 1781 (2012) (“The basic idea of due process . . . was that the law of the land required each branch of government to operate in a distinctive manner . . .”).

⁶⁷ U.S. Const. art. I, §8, cl. 1.

⁶⁸ *Id.* art. I, §8, cl. 3; see also Kathleen Claussen, *Trade War Battles: Congress Reconsiders Its Role*, Lawfare (Aug. 5, 2018), <https://www.lawfareblog.com/trade-war-battles-congress-reconsiders-its-role> (“Congress has regularly empowered the executive to manage foreign commerce without the checks that it has accorded itself in other areas.”).

⁶⁹ E.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582 (1952) (“whether the President was acting within his constitutional power when he issued an order directing the Secretary of Commerce to take possession of and operate most of the Nation’s steel mills.”); *Clinton v. City of New York*, 524 U.S. 417 (1998) (whether President Clinton’s authority to cancel provisions in the Balanced Budget Act and the Taxpayer Relief Act of 1997 was constitutional).

of separation of powers, the Supreme Court has held that Congress can delegate its authority to the Executive:

When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. . . . [An action] executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.⁷⁰

Accordingly, the president has the maximum level of authority when he or she acts pursuant to the delegated power from Congress, even if such prerogative is not enumerated in the Constitution.⁷¹ As such, because the executive action in adjusting imports is within the delegated authority under Section 232, “the Executive’s decisions in the sphere of international trade are reviewable only to determine whether the [p]resident’s action falls within his delegated authority, whether the statutory language has been properly construed, and whether the [p]resident’s action conforms with the relevant procedural requirements.”⁷² The authorization of power from Congress affords the president with a blanket protection from judicial review because “the [p]resident’s findings of fact and the motivations for his action are not subject to review.”⁷³ Accordingly President Trump holds the maximum level of power to control and adjust imports—specifically, the authority to impose the Section 232 Tariffs on any import that he perceives as a threat to the United States.⁷⁴ Moreover, Section 232 protects President Trump and the Section 232 Tariffs from judicial review unless there is evidence of the President’s misconstruction of Section 232.⁷⁵

⁷⁰ *Youngstown Sheet & Tube Co.*, 343 U.S. at 635 (6-3 decision) (Jackson, J., concurring).

⁷¹ *See id.*

⁷² *Florsheim Shoe Co., Div. of Interco, Inc. v. United States*, 744 F.2d 787, 795 (Fed. Cir. 1984).

⁷³ *Maple Leaf Fish Co. v. United States*, 762 F.2d 86, 89 (Fed. Cir. 1985) (“[T]he President’s findings of fact and the motivations for his action are not subject to review.”).

⁷⁴ *See Youngstown Sheet & Tube Co.*, 343 U.S. at 635.

⁷⁵ Because Section 232 serves as a direct constitutional authority for the imposition of the Section 232 Tariffs, “[the President’s] motives, his reasoning, his finding of facts requiring the action, and his judgment are immune from judicial scrutiny.” *U.S. Cane Sugar Refiners’ Ass’n v. Block*, 683 F.2d 399, 404 (C.C.P.A. 1982); *see Severstal Exp. GmbH v. United States*, No. 18-37, slip op. at 15–16 (U.S. Ct. Int’l Trade Apr. 5, 2018) (“To the

In *Severstal Exp. GmbH v. United States*, the U.S. Court of International Trade (the “CIT”) confronted the validity of President Trump’s Section 232 Tariffs: whether President Trump’s imposition of the Section 232 Tariffs exceeded his statutory authority by utilizing Section 232 as a veil for economic protectionism.⁷⁶ However, the court refused to discuss the validity of the tariffs because the court “lack[ed] the power to review the President’s lawful exercise of discretion.”⁷⁷ Nevertheless, by distinguishing between the substance of the President’s exercise of discretion pursuant to a governing statute and his misinterpretation of such statute, the CIT held that “the court may review the executive’s actions for ‘clear misconstruction’ of such limiting language.”⁷⁸

Because President Trump’s exercise of discretion was non-justiciable,⁷⁹ the *Severstal* court focused on whether Section 232 authorized the President to impose the tariffs in response to an economic situation.⁸⁰ The court found that Section 232 is comprised of broad and permissive language, which does not “foreclose[] the President from finding a threat to national security due to the overall economic situation of the steel industry.”⁸¹ According to the court, the factors outlined in Section 232(d) encompass economic factors, including any pretextual motives, such as President Trump’s attempt to use tariffs in trade negotiations to draw concessions from other countries and bolster his position in diplomatic conventions.⁸² Thus, the CIT held that President Trump’s determination and use of national security for economic reasons—even if, as a veil for economic policies—are valid exercise of power because these economic rationales are consistent with Section 232 executive authority.⁸³

Despite public criticism against President Trump’s use of Section 232, the *Severstal* court foreclosed any future possibilities to attack the executive actions relating to the Section 232 Tariffs.⁸⁴ Thus, the American

extent the court may review the action of the President, it is unlikely that the President exceeded his statutory authority.”).

⁷⁶ See *Severstal Exp. GmbH*, slip. op. at 5.

⁷⁷ *Id.*; see also *Corus Group PLC v. ITC*, 352 F.3d 1351, 1361 (Fed. Cir. 2003).

⁷⁸ *Severstal Exp. GmbH*, slip. op. at 16; see *Maple Leaf Fish Co.*, 762 F.2d at 89 (“For a court to interpose, there has to be a clear misconstruction of the governing statute, a significant procedural violation, or action outside delegated authority.”).

⁷⁹ See *Severstal Exp. GmbH*, slip op. at 15–17.

⁸⁰ See *id.* at 15–16, 18, 21.

⁸¹ *Id.* at 22.

⁸² See *id.* at 21–22.

⁸³ See *id.* at 22.

⁸⁴ See *id.* at 22–23.

Institute for International Steel, Inc. (the “AIIS”),⁸⁵ took a different approach to challenge the Section 232 Tariffs by asserting that Section 232 improperly delegates the legislative authority to the President and thus, violates the Constitution.⁸⁶

B. *The Constitutionality of Section 232*

Because President Trump’s levy of the Section 232 Tariffs is a non-justiciable issue,⁸⁷ the AIIS has challenged the constitutionality of Section 232. The AIIS asserts that Section 232 unconstitutionally delegates Congress’s enumerated power to the President, thereby violating the doctrine of separation of powers and the system of checks and balances enshrined in the Constitution.⁸⁸ However, the Supreme Court has held otherwise in *Yakus v. United States*: Nor does the doctrine of separation of powers deny to Congress power to direct that an administrative officer properly designated for that purpose have ample latitude within which he is to ascertain the conditions which Congress has made prerequisite to the operation of its legislative command.⁸⁹

i. The Intelligible Principle Test

Arguably, Section 232 creates an imbalance of power delegated between Congress and the Executive. It raises issues of separation of powers and checks and balances by creating an executive power to “adjust the imports”⁹⁰ in response to a national threat. Although Section 232’s delegation of power appears to be in conflict with the Constitution, the Supreme Court has held that a delegation of legislative power to the Executive is permitted as long as the statute provides an intelligible principle.⁹¹

⁸⁵ The American Institute for International Steel is a non-profit membership corporation that supports free trade of steel. On behalf of its 120 members, it brought action against the United States. *About AIIS*, AMERICAN INSTITUTE FOR INTERNATIONAL STEEL, <http://www.aiis.org/about/>.

⁸⁶ See Complaint at 1, *Am. Inst. for Int’l Steel, Inc. v. United States*, No. 1:18-cv-00152 (U.S. Ct. Int’l Trade Jun. 27, 2018).

⁸⁷ See *Severstal Exp. GmbH*, slip op. at 16–17.

⁸⁸ Complaint, *supra* note 86, at 5–8.

⁸⁹ *Yakus v. United States*, 321 U.S. 414, 425 (1944).

⁹⁰ 19 U.S.C. § 1862(c)(1)(B) (1962).

⁹¹ See *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928) (“If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.”); see also *Chapman & McConell*, *supra* note 66, at 1785 (“For much of our history, Congress and the Supreme Court operated on the loose but workable assumption that Congress could delegate legislative power – the power

In essence, if Congress delegates its authority to another branch of government and provides “an intelligible principle to which the person or body authorized to [act] is directed to conform, such legislative action is not a forbidden delegation of legislative power.”⁹² As such, a delegation of legislative power to the president is constitutional, if it does not leave “the expediency or just operation of such legislation” to the president’s determination and thus, “d[oes] not in any real sense invest the [p]resident with the power of legislation.”⁹³ Furthermore, the intelligible principle test is satisfied “if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of th[e] delegated authority.”⁹⁴ The general policy and boundaries of delegated power can be determined by reviewing the “purpose of the Act, its factual background and the statutory context in which they appear.”⁹⁵

In *American Institute for International Steel, Inc. v. United States*,⁹⁶ the question before the U.S. Court of Appeals for the Federal Circuit (the “Federal Circuit”) is whether “Section 232 [is] facially unconstitutional on the ground that it does not impose any boundaries or limits on the President’s powers under it and therefore constitutes an improper delegation of legislative authority and violates the principles of separation of powers established by the Constitution.”⁹⁷

The Plaintiffs in *American Institute for International Steel, Inc.* initially contested the constitutionality of Section 232 before the CIT, where they asserted that the language of the statute is broad and overly permissive and thus, departs from an ordinary understanding and definition of national security as typically related to national defense and

to make rules – to the executive so long as it provided an ‘intelligible principle’ to govern that discretion.”).

⁹² *J. W. Hampton, Jr., & Co.*, 276 U.S. at 409.

⁹³ *Id.* at 410.

⁹⁴ *Mistretta v. United States*, 488 U.S. 361, 372–73 (1989) (citing *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)).

⁹⁵ *Am. Power & Light Co.*, 329 U.S. at 104.

⁹⁶ On March 25, 2019, the Court of International Trade denied the Plaintiffs’ motion for summary judgment. Thereafter, the Plaintiffs filed a petition for writ of certiorari but the U.S. Supreme Court denied cert. As of August 25, 2019, the case is pending appeal at the U.S. Court of Appeals for the Federal Circuit. Alex Lawson, *Bid to Limit Trump’s Tariff Power Lands In Fed. Circ.*, LAW360 (Aug. 9, 2019), <https://www.law360.com/articles/1187365>.

⁹⁷ Brief of Plaintiffs-Appellants *Am. Inst. For Int’l Steel, Inc.*, and *Sim-Tex, LP*, Kurt Orban Partners, LLC. at 2, *Am. Inst. for Int’l Steel, Inc. v. United States*, No. 19-1727 (Fed. Cir. Aug. 9, 2019) (The other issue is “Did the Court of International Trade erroneously conclude that *Algonquin* controls the outcome of this action?”).

foreign relations.⁹⁸ Moreover, the Plaintiffs claimed that Section 232 lacks limitations on the President's interpretation of national security as it does not provide any import restrictions based on type or quantity, and is without tests to determine the veracity of potential threats.⁹⁹ The CIT, however, rejected the Plaintiffs' claims.¹⁰⁰

Contrary to the Plaintiffs' claims in *American Institute for International Steel, Inc.* that Section 232 is an unconstitutional delegation of authority,¹⁰¹ the Supreme Court, in *Federal Energy Administration, v. Algonquin SNG, Inc.*, held that Section 232 is a proper delegation of legislative power to the Executive because it "easily fulfills" the intelligible principle test.¹⁰² Indeed, as the Plaintiffs claim, the language of Section 232 indicates that President Trump is at liberty to declare almost all imports as a threat to the national security.¹⁰³ However, the Supreme Court found that Section 232(d) provides broad yet detailed categories of factors to consider when determining the magnitude of a threat.¹⁰⁴

According to the *Algonquin* Court, Section 232 has specific preconditions that guide the president's exercise of discretion and thus, satisfies the intelligible principle test.¹⁰⁵ The Court stated that the president does not have complete freedom when enacting tariffs, because: (1) Section 232(b) permits an action after the president's receipt of the Section 232 report from the DoC; and (2) the president can act only when it is "necessary to adjust the imports of such article and its derivatives so that such imports will not threaten to impair the national security."¹⁰⁶ By finding these two factors as sufficient limitations on the president's exercise of discretion, the Court held that Section 232 satisfies the

⁹⁸ See Memorandum in Support of Plaintiffs' Motion for Summary Judgment at 5, Am. Inst. for Int'l Steel, Inc. v. United States, No. 1:18-cv-00152 (U.S. Ct. Int'l. Trade July 19, 2018).

⁹⁹ See Complaint, *supra* note 86, at 5–8.

¹⁰⁰ See Am. Inst. for Int'l Steel, Inc. v. United States, 376 F. Supp. 3d 1335, 1345 (Ct. Int'l Trade 2019).

¹⁰¹ See Complaint, *supra* note 86, at 7, 12–16, 18–19.

¹⁰² Fed. Energy Admin. v. Algonquin SNG, Inc., 426 U.S. 548, 558–60 (1928).

¹⁰³ See Brief of Plaintiffs-Appellants Am. Inst. For Int'l Steel, Inc., and Sim-Tex, LP, Kurt Orban Partners, LLC., *supra* note 97, at 2 ("[T]he lack of any legislative boundaries in section 232 enables the President to do whatever he chooses regarding tariffs, quotas, or other restrictions on imports.").

¹⁰⁴ See *Severstal Exp. GmbH v. United States*, No. 18-37, slip op. at 20 (U.S. Ct. Int'l Trade Apr. 5, 2018); see also *Algonquin SNG, Inc.*, 426 U.S. at 559 ("[T]he leeway that [Section 232] gives the President in deciding what action to take in the event the preconditions are fulfilled is far from unbounded.").

¹⁰⁵ See *Algonquin SNG, Inc.*, 426 U.S. at 559–60; see also *Severstal Exp. GmbH*, slip op. at 22–23.

¹⁰⁶ *Algonquin SNG, Inc.*, 426 U.S. at 559; see 19 U.S.C. § 1862(c)(1)(A)(ii) (1970); *Severstal Exp. GmbH*, slip op. at 22–23.

intelligible principle test.¹⁰⁷ Moreover, despite the AIIS's claim that the statute lacks clear guidelines, the Court concluded that there is no current law or case that outlines the degree of specificity for governing standards of delegated authority, or the need "to compel Congress to prescribe detailed rules."¹⁰⁸

In addition to Section 232's "clear preconditions to [p]residential action,"¹⁰⁹ the *Algonquin* Court held that the statute properly delegates the legislative authority to the Executive because it outlines the general policy, the acting agency, and the boundaries of the delegated authority.¹¹⁰ Furthermore, the Court refused to construe the statute narrowly "to avoid 'a serious question of unconstitutional delegation of legislative power'" because the standards of Section 232(b) are "clearly sufficient to meet any delegation doctrine attack."¹¹¹ Relying on *Algonquin*, the CIT rejected the Plaintiffs' argument that Section 232 is without an intelligible principle.¹¹² As such, the Plaintiffs face a significant challenge to persuade the Federal Circuit to overturn the earlier ruling from *Algonquin*.

Although the Supreme Court has held that Section 232 satisfies the intelligible principle test, the question remains whether the factors outlined in the statute suffice. The current language of Section 232 undeniably lack utility in judicial review because of the absence of specific rules and standards the president is required to follow when adjusting imports.¹¹³ Thus, such lack of specificity forecloses the judicial power to enforce the boundaries of the law, which aims to closely adhere to the intention of Congress.¹¹⁴

¹⁰⁷ *Algonquin SNG, Inc.*, 426 U.S. at 560.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 559.

¹¹⁰ *See id.*; *see also* J. W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 408 (1928) ("The Congress may not delegate its purely legislative power to a commission, but, having laid down the general rules of action under which a commission shall proceed, it may require of that commission the application of such rules to particular situations and the investigation of facts, with a view to making orders in a particular matter within the rules laid down by the Congress."); *Mistretta v. United States*, 488 U.S. 361, 372–73 (1989) (citing *Am. Power & Light Co. v. Secs. & Exch. Comm'n*, 329 U.S. 90, 105 (1946)) (A statute is "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.").

¹¹¹ *Algonquin SNG, Inc.*, 426 U.S. at 558–59.

¹¹² *Am. Inst. for Int'l Steel, Inc. v. United States*, 376 F. Supp. 3d 1335, 1340 (Ct. Int'l Trade 2019).

¹¹³ Response Memorandum in Support of Plaintiffs' Opposition to Defendants' Motion for Judgment on the Pleadings and Reply Memorandum in Support of Plaintiffs' Motion for Summary Judgment at 20–21, *Am. Inst. for Int'l Steel, Inc. v. United States*, No. 1:18-cv-00152 (Ct. Intl. Trade Oct. 5, 2018).

¹¹⁴ *See* Chapman & McConell, *supra* note 66, at 1786 ("[T]here are no judicially manageable standards for determining 'the permissible degree of policy judgment that can be left to those executing or applying the law.'").

ii. The Lack of Judicial Review

Procedural checks, such as judicial review, are generally employed to control and monitor various administrative agencies' decision-making procedures.¹¹⁵ The Administrative Procedure Act ("APA")¹¹⁶ governs federal agencies' rulemaking procedures and provides standards of judicial review for agency misconduct.¹¹⁷ In theory, petitioners of the exclusion process and legal practitioners should be able to attack the validity of the Section 232 Tariffs under the APA as an alternative to challenging the constitutionality of the Section 232 Tariffs.¹¹⁸

Using the APA as a vehicle to challenge the tariffs remains challenging, however, because the Supreme Court has held that the president does not constitute "an agency" for the purposes of the APA and, therefore, the president's modification to tariffs and the corresponding presidential proclamations do not constitute "agency action."¹¹⁹ Because the president is not subjected to the APA, any claims that attack the president's lack of compliance with the APA and other governing statutes are moot.¹²⁰ Thus, the Section 232 Tariffs are a by-product of President Trump's unconstitutional "blank check" from Section 232 because they are not subjected to any legislative or judicial review.¹²¹ As such, the statute grants the president the sole power to take action on imports as a de facto agency of Congress; yet, the law fails to supply review as a necessary check on the executive action.

Bound by *Algonquin*, the CIT did not find the lack of judicial review to be unconstitutional in *American Institute for International Steel, Inc.*¹²² The CIT held that "presidential determinations committed to the

¹¹⁵ See Valerie C. Brannon, Cong. Research Serv., LSB10172, Can a President Amend Regulations by Executive Order? (2018).

¹¹⁶ 5 U.S.C. § 551 *et seq.* (1946).

¹¹⁷ *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992).

¹¹⁸ *See id.*

¹¹⁹ *See Franklin*, 505 U.S. at 796 ("We hold that the final action complained of is that of the President, and the President is not an agency within the meaning of the Act. Accordingly, there is no final agency action that may be reviewed under the APA standards."); *Dalton v. Specter*, 511 U.S. 462, 465 (1994) ("[T]he President's actions were not reviewable under the APA, because the President is not an 'agency' within the meaning of the APA. . . . [But] the 'President's actions may still be reviewed for constitutionality.'"); *Michael Simon Design, Inc. v. United States*, 609 F.3d 1335, 1337–38 (Fed. Cir. 2010).

¹²⁰ *See Franklin*, 505 U.S. at 796; *Dalton*, 511 U.S. at 465.

¹²¹ *See United States v. Lopez*, 514 U.S. 549, 602 (1995) (Thomas, J., concurring) (reasoning that a federal government's control that impedes on the local government is an unconstitutional blank check; "[s]uch a formulation of federal power is no test at all: it is a blank check").

¹²² *See Am. Inst. for Int'l Steel, Inc. v. United States*, 376 F. Supp. 3d 1335, 1341 (Ct. Int'l Trade 2019) ("[T]here has been no change in the legal landscape since *Algonquin* as far as section 232 is concerned.").

President's discretion by an enabling statute are not subject to review for rationality, findings of fact, or abuse of discretion."¹²³ Moreover, the court found that Congress intentionally "precluded an inquiry for rationality, fact finding, or abuse of discretion" by excluding any qualifying language or standard on the president's concurrence with the DoC's findings from the Section 232 investigations.¹²⁴ As such, the CIT rejected the Plaintiffs' claim that Section 232's lack of judicial review violates the constitutional system of checks and balances¹²⁵ and held that Congress had intended the president's determination to be left to his discretion without judicial review.¹²⁶

Although the CIT's analysis is consistent with the findings in *Algonquin*, the CIT neglected to consider an important issue in the intelligible principle test: whether the statute leaves the operation of the intended legislation to the determination of the president.¹²⁷ Notwithstanding the CIT's findings that Congress intended to allow the president to make judgments based on his or her discretion without any limitations or qualifications, the question remains whether Congress properly outlined the intelligible principle in Section 232 to facilitate the accountability of the president's actions.

In *Yakus*, the Supreme Court held that if "Congress has specified the basic conditions of fact upon whose existence or occurrence, ascertained from relevant data by a designated administrative agency, it directs that its statutory command shall be effective."¹²⁸ Because the objective of judicial review is "to ascertain whether the will of Congress has been obeyed [by the President]," the Court reasoned that a statute that clearly outlines the boundaries and guidelines of the president's power is sufficient to determine whether he or she complied to Congress's will.¹²⁹ Moreover, the Court held that a statute with specific guidelines that "are sufficiently definite and precise [will] enable Congress, the courts and the public to ascertain whether the [president] . . . has conformed to those standards."¹³⁰

¹²³ *Am. Inst. for Int'l Steel, Inc.*, 376 F. Supp. 3d at 1343.

¹²⁴ *Id.*

¹²⁵ See Complaint, *supra* note 86, at 1, 19.

¹²⁶ See *Am. Inst. for Int'l Steel, Inc.*, 376 F. Supp. 3d at 1343 ("the President's determination as to the form of remedial action is a matter 'in the judgment of the President.'") (citing 19 U.S.C. § 1862(c)(1)(A)(ii)).

¹²⁷ See *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 410 (1928) (discussing that a delegation is proper if the statute does not leave "the expediency or just operation of [] legislation" to the determination of the president.).

¹²⁸ *Yakus v. United States*, 321 U.S. 414, 424–25 (1944).

¹²⁹ *Id.* at 425 ("This depends . . . upon the determination whether the definition sufficiently marks the field within which the Administrator is to act so that it may be known whether he has kept within it in compliance with the legislative will.").

¹³⁰ *Id.* at 426.

Accordingly, Section 232 may seem self-sufficient without judicial review as the *Algonquin* Court held that the statute broadly outlines the boundaries of the president's actions: he or she can adjust imports for the exclusive sake of national security.¹³¹

In practice, however, Section 232 does not plainly set the boundaries for presidential power due to the lack of guidance for courts and Congress to regulate the executive action. Section 232 fails to meet the preconditions laid out in *Yakus* because it fails to outline: (1) any statutory requirement(s) for the president to follow the DoC's recommendations; (2) guidelines on determining the method of remedial measure(s); and (3) rationale(s) on selecting the number of rates for the remedial measures.¹³²

The broad and permissive language of Section 232, which lacks "definite and precise" standards, inhibits Congress's ability to ascertain whether the president has complied to Congress's will.¹³³ It "provides virtually unbridled discretion to the [p]resident with respect to the power over trade that is reserved by the Constitution to Congress."¹³⁴ Although the president's interpretations of the statute—that are plainly unrelated to national security—would be subject to judicial review, in theory, "identifying the line between regulation of trade in furtherance of national security and an impermissible encroachment into the role of Congress could be elusive in some cases because judicial review would allow neither an inquiry into the [p]resident's motives nor a review of his fact-finding."¹³⁵

Without specific boundaries on the president's exercise of discretion, there is potential for presidential abuse of power.¹³⁶ For example, the president could make a decision to impose tariffs on an import that poses

¹³¹ See Defendants' Reply in Support of their Motion for Judgment on the Pleadings at 5–6, *Am. Inst. for Int'l Steel, Inc. v. United States*, No. 18-00152 (Ct. Int'l Trade Nov. 9, 2018).

¹³² See *Am. Inst. for Int'l Steel, Inc. v. United States*, 376 F. Supp. 3d 1335, 1346 (Ct. Int'l Trade 2019) (Katzmann, J., dubitante).

¹³³ See *Yakus*, 321 U.S. at 425–26.

¹³⁴ *Am. Inst. for Int'l Steel, Inc.*, 376 F. Supp. 3d at 1352 (Katzmann, J., dubitante).

¹³⁵ *Id.* at 1344–45 ("One might argue that the statute allows for a gray area where the President could invoke the statute to act in a manner constitutionally reserved for Congress but not objectively outside the President's statutory authority, and the scope of review would preclude the uncovering of such a truth.").

¹³⁶ See Chapman & McConell, *supra* note 66, at 1785 ("A certain degree of interpretive discretion is inherent in law execution, however precisely crafted, is self-defining with respect to all conceivable applications. Yet at a certain point, broad delegations of standardless power to the executive strain the understanding that the executive can regulate conduct only pursuant to law.").

no facially possible threat to the nation's security, such as peanut butter.¹³⁷ However, Section 232 executive power is untouchable by virtue of its non-justiciability, which resulted in the courts' implicit declaration that "the discretion claimed by the executive is genuinely rooted in congressional delegation."¹³⁸

In *American Institute for International Steel, Inc.*, the Federal Circuit must decide whether Section 232 is a permissible delegation of Congress's authority.¹³⁹ The Federal Circuit should interpret Section 232 under strict scrutiny "to ensure that [the] delegation is the genuine intention of Congress, and not an instance of executive overreach."¹⁴⁰

III. THE LEGISLATIVE FIGHT OVER THE SECTION 232 TARIFFS

Since the enactment of President Trump's Section 232 Tariffs, both Democratic and Republican lawmakers have proposed numerous legislative bills to limit the President's Section 232 authority, though they were short-lived.¹⁴¹

Immediately following the government shutdown in late-January 2019, however, President Trump and the Section 232 Tariffs became a political relevant once again, as both supporters and opponents of the tariffs introduced new bills.¹⁴² Bi-partisan and non-partisan groups of the House and Senate have proposed several bills to curtail the President's authority under Section 232, such as the Global Trade Accountability Act of 2019,¹⁴³ the Bicameral Congressional Trade Authority Act,¹⁴⁴ the Trade Security Act of 2019,¹⁴⁵ the Reclaiming Congressional Trade Authority

¹³⁷ See Alex Lawson, *Trade Court Grapples With Trump's Security-Based Tariffs*, LAW360 (Dec. 19, 2018), <https://www.law360.com/articles/1113210/trade-court-grapples-with-trump-s-security-based-tariffs>.

¹³⁸ Chapman & McConnell, *supra* note 66, at 1786.

¹³⁹ See Brief of Plaintiffs-Appellants Am. Inst. For Int'l Steel, Inc., and Sim-Tex, LP, Kurt Orban Partners, LLC., *supra* note 97, at 2.

¹⁴⁰ Chapman & McConnell, *supra* note 66, at 1786.

¹⁴¹ See Claussen, *supra* note 68; Jordain Carney, *Senate Takes Symbolic Shot at Trump Tariffs*, THE HILL (July 11, 2018, 1:24 PM), <https://thehill.com/blogs/floor-action/senate/396505-senate-takes-symbolic-shot-at-trump-tariffs>; Bryan Koenig, *Sens. Propose Bipartisan Bill to Curb Trump's Tariff Powers*, LAW360 (Aug. 1, 2018, 7:21 PM), <https://www.law360.com/articles/1069273/sens-propose-bipartisan-bill-to-curb-trump-s-tariff-powers>.

¹⁴² See Niquette, *supra* note 59; Megan Cassella, *Lawmakers Prep Bipartisan Bill to Curtail Trump's Tariff Authority*, POLITICO (Jan. 25, 2019, 6:44 PM), <https://www.politico.com/story/2019/01/25/limit-trump-tariffs-1120215>.

¹⁴³ Trade Accountability Act of 2019, H.R. 723, 116th Cong. § 1 (2019).

¹⁴⁴ Bicameral Congressional Trade Authority Act of 2019, H.R. 940, 116th Cong. § 1 (2019).

¹⁴⁵ Trade Security Act of 2019, H.R. 1008, 116th Cong. § 1 (2019).

Act of 2019,¹⁴⁶ and the Promoting Responsible and Free Trade Act of 2019.¹⁴⁷ Although these bills vary in their methods of altering Section 232 authority and are sponsored by different partisan-groups, they all have a common objective: to limit the executive power in adjusting imports.¹⁴⁸ The likelihood for one of these bills to pass as law remains hopeful as they are supported by both chambers of Congress, along with sponsors from the manufacturing and farming industries.¹⁴⁹

Even if one of these bills is enacted under the Trump Administration, however, President Trump will likely veto the bill due to his support for the United States Reciprocal Trade Act (the “RTA”).¹⁵⁰ Introduced by Republican lawmakers, the RTA seeks to expand the President’s authority to increase tariffs in response to any foreign trade barriers imposed upon American products.¹⁵¹ If passed, President Trump would have even wider liberty to control trade.¹⁵² Thus, President Trump is an avid supporter of the RTA and has urged Congress to support this Act.¹⁵³

The enactment of any one of these bills will alter Section 232 by either curtailing or expanding the President’s trade prerogative to control imports. Nevertheless, even if none of these bills becomes law, lawmakers will likely persevere to modify Section 232 through repeal or amendment.¹⁵⁴ A repeal of Section 232 would likely remove the statute’s delegation of legislative power to the President, and consequently invalidate all Section 232 tariffs, if applied retroactively.¹⁵⁵ Although such repeal would eliminate this entire issue, President Trump would likely veto any potential repeal of Section 232 due to his support for the RTA.

¹⁴⁶ Reclaiming Congressional Trade Authority Act of 2019, S. 899, 116th Cong. § 1 (2019).

¹⁴⁷ Promoting Responsible and Free Trade Act of 2019, H.R. 3673, 116th Cong. § 1 (2019).

¹⁴⁸ See Niquette, *supra* note 59; Carney, *supra* note 141; Koenig, *supra* note 141; Cassella, *supra* note 142.

¹⁴⁹ See Niquette, *supra* note 59.

¹⁵⁰ See United States Reciprocal Trade Act, H.R. 764, 116th Cong § 1 (2019).

¹⁵¹ See Megan Cassella, *Draft Trade Bill Would Give Trump Expansive Powers to Raise Tariffs*, POLITICO (Jan. 11, 2019, 2:30 PM), <https://www.politico.com/story/2019/01/11/trade-bill-trump-tariffs-1079424>.

¹⁵² *Id.*

¹⁵³ See Alex Lawson, *Momentum Builds to Check Trump’s Trade Power*, LAW360 (Feb. 6, 2019, 8:33 PM), <https://www.law360.com/articles/1126546/momentum-builds-to-check-trump-s-trade-power>; See Jenny Leonard & Jennifer Jacobs, *White House to Roll Out Bill to Expand Trump’s Tariff Powers, Sources Say*, BLOOMBERG (Jan. 8, 2019, 11:01 PM), <https://www.bloomberg.com/news/articles/2019-01-09/white-house-is-said-to-roll-out-bill-to-expand-tariff-powers>.

¹⁵⁴ See Claussen, *supra* note 68.

¹⁵⁵ See *id.*

Revision of Section 232 is a more realistic options. Therefore, revision should be prioritized to establish a compromise for both supporters and opponents of the Section 232 Tariffs. For example, Congress may restrict the President's creation of new tariffs by expanding Section 232's exception provision to include additional items or outline countries subjected to limitations.¹⁵⁶ Analogous to the exception for petroleum products, an amendment to Section 232's exception provision could require the president to request for Congress's approval prior to imposing tariffs on particular products or countries.¹⁵⁷ Alternatively, Congress may amend the broad and permissive language of Section 232 to incorporate comprehensive standards on how and what the president can do to adjust imports. In the absence of judicial review, these standards will allow the people and the nation to determine whether the president has acted within the scope of law.¹⁵⁸

IV. CONCLUSION

The future of Section 232 and the Section 232 Tariffs can be determined by either: (1) the pending decision from the Federal Circuit in *American Institute for International Steel, Inc.*; or (2) the enactment of a bill to either expand or limit executive power to adjust imports. If a legislative bill is not enacted prior to the Federal Circuit's decision, the Federal Circuit will determine the constitutionality of the statute and the future of the Section 232 Tariffs. If the Plaintiffs prevail, the court may repeal the tariffs and eliminate Congress's deference in delegating its legislative authority to levy taxes and control commerce. Such a decision may halt any future executive orders under Section 232 and prevent President Trump and future presidents from manipulating the definition of national security to use it as a false pretense for the furtherance of personal or non-security related objectives.

Despite President Trump's portrayal of tariffs as an American victory, using tariffs as a negotiation tactic is precarious and should be avoided. Trade-related actions that are taken to limit other nations' power may in turn harm the United States. For example, the continuation of the Section 232 Tariffs is projected to shrink the American economy by increasing the price of goods while reducing American exports, thereby decreasing gross domestic product by about 0.3% and household income by \$580 in

¹⁵⁶ See *id.*

¹⁵⁷ See *id.*

¹⁵⁸ See *Yakus v. United States*, 321 U.S. 414, 424–25 (1944).

2020.¹⁵⁹ Moreover, the Section 232 Tariffs have left American citizens vulnerable because they are forced to face the consequences of tariffs on imports from a sole or dominant exporting country.¹⁶⁰ Although President Trump intended to limit trading partners' enrichment from exports to the United States, these countries have continued to prosper because they increase consumer prices to compensate for the exporting fees.¹⁶¹ Similarly, American manufacturers and farmers have also confronted tariffs imposed by retaliating countries.¹⁶²

Although the fate of Section 232 remains ambiguous, the future of the statute's delegation of power remains unobstructed: the United States will continue to levy new tariffs, quotas, or other restrictions on a variety of imports from numerous trading partners while those countries retaliate by issuing comparable or higher rates on American exports. Under the Trump Administration, there is no foreseeable ending of the tariff tug-of-war unless the Federal Circuit or Congress intervenes to limit Section 232's untouchable executive authority.

¹⁵⁹ See Kaitlyn Burton, *Trump Tariffs Impede Economic Growth, Budget Agency Says*, LAW360 (Aug. 22, 2019, 9:47 PM), <https://www.law360.com/articles/1191470/trump-tariffs-impede-economic-growth-budget-agency-says>.

¹⁶⁰ Coca-Cola Co. and Home Depot pointed to the tariffs as their reasons to increase prices in the United States. Coy, *supra* note 15.

¹⁶¹ See *id.*

¹⁶² See *id.*